STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 26, 2001
v	No. 214390 Genesee Circuit Court
DONALD STANLEY WILSON, a/k/a DON STANLEY WILSON, Defendant-Appellant.	LC No. 96-54492-FH

Before: Bandstra, C.J., and Saad and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of 50 to 224 grams of cocaine with intent to deliver, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), fourth-degree fleeing and eluding a police officer, MCL 750.479a; MSA 28.747(1), and felonious assault, MCL 750.82; MSA 28.227. Defendant received a sentence of ten to thirty years' imprisonment for the possession with intent to deliver offense, sixty-one days for the fleeing and eluding conviction, and, as a second habitual offender, MCL 769.10; MSA 28.1082, three to six years for the felonious assault conviction. He appeals as of right. We affirm.

Defendant contends that there was insufficient evidence that he possessed cocaine to sustain his possession with intent to deliver conviction. We review a claim that the evidence was insufficient to support a defendant's conviction by considering the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Defendant was the driver of a car who led several police cars on a chase. The police attempted to pull defendant over because he and his Lincoln Continental fit the description, given by an anonymous tipster, of a car and driver who would be transporting one-eighth of a kilogram of powder cocaine from Detroit to Flint. Every detail of the tipster's information – the car's license plate number and make, the three occupants, and defendant's description – matched the description of defendant, his passengers, and his car. Officer Philip Smith testified that he noticed early in the pursuit that someone in defendant's car rolled down the right, rear window. Smith retraced the pursuit route and found a bag with 4.37 ounces of powdered cocaine. Defendant told Sergeant James McLellan that for driving a man described only as "Jay" to

Detroit to pick up cocaine, he would receive one-quarter ounce of the substance. Defendant did not describe Jay forcing defendant at gunpoint to flee the police.

The tipster said that one-eighth of a kilogram of powder cocaine would be transported. Defendant argues that the cocaine found could not belong to him because he and Jay were to pick up 4½ ounces of cocaine, a slightly greater amount than was recovered. We find no support in the record for the conclusion that defendant believed his codefendant was acquiring 4½ ounces of cocaine rather than the one-eighth of a kilogram mentioned by the tipster. Sergeant McLellan testified that the cocaine recovered weighed 123.8 grams, which is only 1.2 grams less than the amount indicated in the tip. This small differential in the weight of the cocaine is not significant given the corroborating circumstances and the fact that McLellan testified that the overall recovered amount was distinctively large. However, we conclude that, despite this discrepancy, taken in the light most favorable to the prosecution, the evidence established that the cocaine had once been in defendant's Continental.

The next inquiry is whether the cocaine can be attributed to defendant, the car's driver, when the evidence tended to show that it was thrown out the back, passenger window. It is well established that a person need not have actual physical possession of a controlled substance to be guilty of possessing it. *Wolfe*, *supra* at 519-520. Possession may be either actual or constructive. *Id*. A defendant does not need to be the owner of the recovered narcotics. *People v Harper*, 365 Mich 494, 507; 113 NW2d 808 (1962). Further, possession may be joint, with more than one person actually or constructively possessing a controlled substance. *Wolfe*, *supra* at 520; see also *People v Griffin*, 235 Mich App 27, 34; 597 NW2d 176 (1999).

As in *Wolfe*, there was no direct evidence that defendant had actual possession of cocaine. *Wolfe*, *supra* at 520. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Wolfe*, *supra* at 521, citing *United States v Rackley*, 742 F2d 1266, 1272 (CA 11, 1984). Mere presence at a location where drugs are found is insufficient to prove constructive possession. *Wolfe*, *supra* at 520; see, e.g., *Harper*, *supra* at 500. Rather, some additional connection between the defendant and the contraband must be proven. *Wolfe*, *supra* at 520; *People v Vaughn*, 200 Mich App 32, 36; 504 NW2d 2 (1993).

Constructive possession may also be proven by the defendant's participation in a joint venture to possess a controlled substance. See *Wolfe*, supra at 521, citing *United States v Disla*, 805 F2d 1340, 1350 (CA 9, 1986). In the instant case, by his own admission to Sergeant McLellan, defendant participated in a joint venture. Defendant agreed to drive "Jay" to Detroit in return for one-quarter ounce of cocaine. Further, as in *Wolfe*, defendant fled the police when the police attempted to intervene. *Wolfe*, *supra* at 522-523. Although the defense suggested that defendant may have been forced to flee the police by a gun-wielding codefendant, defendant said no such thing in his statement to McLellan. He only told McLellan that Jay told him to "take off," and that Jay told him which way to go.

Because all conflicts in the evidence must be resolved in favor of the prosecution, *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997), we believe that sufficient evidence was presented to convict defendant of possession with intent to deliver cocaine. Evidence adduced at trial showed that defendant had constructive possession of the cocaine because he "had the right

to exercise control of the cocaine and knew that it was present." *Wolfe, supra* at 520, citing *People v Germaine*, 234 Mich 623, 627; 208 NW 705 (1926).

Defendant next argues that the sentencing judge should have considered the substantial and compelling reasons that would have required reducing defendant's sentence for possession with intent to deliver below the ten-year statutory minimum. A trial court may depart from a mandatory minimum term of imprisonment for an adult if it finds on the record that there are substantial and compelling reasons to do so. MCL 333.7401(4); MSA 14.15(7401)(4); *People v Daniel*, 462 Mich 1, 6-7; 609 NW2d 557 (2000). The statutory authorization to depart downward from the required minimum sentence was intended to vest sentencing courts with discretion only in exceptional cases; as a result, such discretion is narrow. *People v Perry*, 216 Mich App 277, 282; 549 NW2d 42 (1996); *People v Downey*, 183 Mich App 405, 416; 454 NW2d 235 (1990). The court should start with the presumption that the mandatory minimum sentence is appropriate. *Id.* at 413. A departure must be based on objective and verifiable factors. *Daniel, supra* at 6. Appropriate factors include: (1) the facts of the crime that mitigate the defendant's culpability; (2) the defendant's prior record; (3) the defendant's age; (4) the defendant's work history; and (5) the defendant's cooperation with police following arrest. *People v Fields*, 448 Mich 58, 76-77; 528 NW2d 176 (1995). Particular emphasis should be given to mitigating circumstances surrounding the offense and the defendant's cooperation with police. *Id.*

Here, defendant argues that the facts of the crime mitigate defendant's culpability because only a small portion of the cocaine was his and that he did not purchase the drugs. Even assuming defendant's version of the story is correct, his actions established that he agreed to a joint venture to acquire a sizable amount of cocaine. Defendant's share, one-quarter ounce of cocaine, still greatly exceeds the one-tenth of a gram that Sergeant McLellan testified was the usual amount possessed for personal use. This is true regardless of the fact that defendant allegedly was going to share it with another person. Further, not only did defendant flee the police but, while driving, he struck Officer Harold Payer with his automobile. We cannot conclude that the facts of the case demonstrate any substantial and compelling reasons to reduce defendant's sentence below the statutory minimum.

Appellant filed a supplemental brief containing three issues raised by defendant in pro per. Defendant first contends that he was denied effective assistance of counsel. Defendant did not obtain a hearing to make a testimonial record to support his claim. See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). As a result, review of his claim is foreclosed unless the record contains sufficient detail to support defendant's position. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996).

To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 690, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *Stanaway, supra* at 687. Counsel's

performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

Defendant raises numerous different acts or omissions of counsel that he believes demonstrate counsel's ineffectiveness. First, defendant contends that counsel was ineffective for failing to object to what defendant characterizes as testimony and argument about his postarrest silence. McLellan had testified that he took defendant's statement, in which defendant claimed that "Jay," the passenger in his car, had been the owner of the cocaine found by police. Defendant also told McLellan that "Jay" was the passenger's street name. Defendant had claimed that he did not know the last name of "Jay." McLellan testified that he was interested in getting information on where he could find "Jay," who had fled police. As a result, McLellan gave defendant his business card and asked defendant to contact him if he had information about "Jay's" last name and where he could be reached. McLellan testified that defendant had never called him with the information he sought. During closing argument, the prosecutor referred to this evidence, saying that defendant's failure to follow up with McLellan was inconsistent with the behavior of an innocent person.

While we recognize that postarrest silence cannot generally be used as evidence, see *People v Bigge*, 288 Mich 417; 285 NW 5 (1939), the "silence" referenced by defendant is not, in fact, postarrest silence protected by the right against self-incrimination. *Bigge* is applicable only in situations in which the defendant is silent in the face of an accusation. *People v Hackett*, 460 Mich 202, 214-215; 596 NW2d 107 (1999). When a defendant has waived his rights during questioning, evidence of omissions in his statement may be admitted. *People v McReavy*, 436 Mich 197, 211-212; 462 NW2d 1 (1990). In this case, defendant was not silent; he waived his rights and denied his guilt, but never gave the police information on the person he claimed to be the owner of the cocaine. Thus, after defendant had given his statement, he engaged in conduct that was inconsistent with his claim that "Jay" was, in fact, the possessor of the cocaine. This evidence was admissible and counsel was not ineffective for failing to object to its admission.

In addition, we see no impropriety in the prosecutor's argument. A prosecutor may present argument based on the evidence and reasonable inferences from that evidence as long as it relates to the prosecution's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Given that the evidence of defendant's failure to provide police with further information about "Jay" was admissible, it was a proper subject for the prosecution's argument. Counsel was not ineffective for failing to object.

Defendant also complains of counsel's failure to object on two different occasions to the prosecutor's reference to counsel making certain arguments because he was paid to do so. We recognize that such arguments are generally considered improper. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). However, as with all matters involving jury argument, the challenged statements must be viewed in context. *Id*. at 608. In the present case, defense counsel had challenged the prosecution's closing remarks, saying that the prosecutor was arguing that anything a defense attorney said was not worthy of belief, and that "everything [defense counsel] say[s] is crap." In rebuttal, the prosecution pointed to this portion of the

argument, saying "I didn't say that. And I guess I don't care if [defense counsel] is mischaracterizing what I say or attacking me, I don't – I don't care. That's his job. I mean, he's paid big money to come in here and attack me." While the gratuitous reference to defense counsel's fee may be inappropriate, in the context of the arguments as a whole, it is clear that the prosecutor's argument was a response to defense counsel.

Similarly, we find the second comment to be a response to the argument of defense counsel, who had argued that it was possible that defendant had fled police in his car because his passenger had threatened to kill him. Counsel had made this argument despite the fact that there was no direct evidence of duress, and relied only on surmise. In response, the prosecutor argued that (1) there was no evidence of duress, and (2) defendant's demeanor at trial, which included "smirking at the jury . . . the prosecutor . . . the witnesses," was inconsistent with that of a person who had been improperly accused and who had acted only under duress. The prosecutor then went on to say, "Now, [defense counsel], and I would say shame on you, but you're paid big money to come in here and say this. I would say shame on you for saying the codefendant wasn't charged. . . . There's no requirement that everybody be charged." Defense counsel had earlier argued that the prosecution's case against defendant was flawed because it had failed to charge or subpoena either the person who had fled the scene, or another passenger, a woman who allegedly was in defendant's car at the time he was arrested. Again, while we do not condone the references to defense counsel's payment, we believe that the statements, taken in context, were a proper response to the argument of defense counsel.

Defendant argues that counsel was ineffective for eliciting evidence on cross-examination of a police officer that a statement had been taken from the woman in defendant's car. We disagree. During examination of the officer, defense counsel was attempting to develop evidence that the police had no evidence to support the conspiracy charge. On redirect, the prosecutor attempted to explore whether the statement contained any evidence to support defendant's duress theory. Defense counsel objected on hearsay grounds to any testimony about the contents of the statement. The objection was sustained. The prosecutor went on to ascertain that the police had not received information from anyone to support defendant's claim of duress. Defendant has failed to rebut the presumption that counsel was engaging in trial strategy for the line of questioning that he pursued.

Defendant further contends that counsel was ineffective because he "improperly stipulated that the substance was cocaine, thereby 'proving' an element of the offense." A review of the record makes clear that the thrust of the defense was that (1) he did not possess the cocaine, and (2) he was under duress when he hit the police officer with his car while trying to escape from police. In this regard, the decision to stipulate to an element of the offense clearly constituted a strategy to focus the defense. Cf. *People v Garcia*, 51 Mich App 109, 114-115; 214 NW2d 544 (1974), affirmed 398 Mich 250 (1976). We will not second-guess defense counsel's strategy.

Defendant next claims that counsel was ineffective for failing to object to what he claims was the trial court's indication to the jury that defendant's girlfriend was in the courtroom. Defendant claims that this indication subjected him to "possible racial bias and potential harm" because he is African-American and his girlfriend is Caucasian. Although the record does not

affirmatively show that any such statement was made, the original trial judge stated that a remark of some sort was made off the record during a hearing on defendant's motion for new trial. The judge recused himself from any consideration of the portion of defendant's motion for new trial that alleged misconduct on his part. Before the successor judge, defense counsel said that he had not been aware of the court's statement because he had not been in the courtroom when the statement was made. Defendant's motion for new trial was denied, but only after the jury foreman had informed the successor judge that there was no discussion among the jurors of defendant's relationship with anyone.

A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thus deprive the defendant of a fair trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). In a situation similar to that in the present case, the California Court of Appeals rejected a claim that a defendant was entitled to reversal because the court had made statements that could inflame racial prejudice of the jury. See *People v McGowan*, 269 Cal App 2d 740, 743; 75 Cal Rptr 53 (1969). The court found that "any embarrassment would not reasonably have inflamed the jury against the defendants' race." *Id*. In this case, we know only that a statement of some sort was made to the jury about the presence in the courtroom of defendant's girlfriend. The parties also do not dispute that defendant is African-American while his girlfriend was white. However, the jury foreman informed the court that there was no discussion of any sort about the relationship. We decline to presume harm from a statement that does not appear in the record, especially when there is evidence in the record that, even if improper, there was no harm. Given that defense counsel raised the issue on motion for new trial, and that the jury did not discuss defendant's relationship during deliberations, we cannot conclude that counsel was ineffective for failing to object at trial.

Defendant next contends that counsel was ineffective for failing to object to evidence that the police had received an anonymous tip giving the police detailed information about the drug transport, including the make, model, and license number of the car, that someone named "Stan" would be driving the car, and describing defendant in detail. Defendant argues that the use of a statement from an anonymous tipster violated his rights under the Confrontation Clause. We agree that the admission of this evidence would have been improper when not accompanied by a limiting instruction, had such an instruction been requested. See *People v McAllister*, 241 Mich App 466, 469-70; 616 NW2d 203 (2000). However, the introduction of this evidence was harmless. Defendant admitted to police that he had agreed to bring the drugs from Detroit in return for a quarter-ounce of cocaine. We cannot see how defendant was harmed by the failure to give a limiting instruction on the statement of the anonymous tipster, which told the jury no more than defendant had admitted to police. Thus, although counsel should have requested a limiting instruction, any omission was harmless.

In a related argument, defendant contends that counsel was ineffective for eliciting evidence that the informant had previously given reliable information, and for failing to move for disclosure of the informant's identity. The challenged questioning came during recross-examination of a police witness, when counsel attempted to determine how much of the officer's conclusions as to defendant's participation was based on fact, and how much was based on surmise. The mode of examination selected by counsel is trial strategy, and cannot form the basis for a claim of ineffective assistance. As for the failure to move for disclosure of the

informant's identity, defendant presents no argument, and we cannot discern, how the outcome of the case would have been different if defendant had known the identity of the informant, given that defendant's statement to police was before the jury.

Defendant argues that counsel was ineffective for failing to properly move to suppress defendant's statement as illegally seized evidence. See *Brown v Illinois*, 422 US 590, 605; 95 S Ct 2254; 45 L Ed 2d 416 (1975). However, we find no evidence, and defendant points to none, showing that defendant's Fourth Amendment rights were violated before he gave his statement to police, or that his statement was the fruit of any such violation. We cannot conclude that counsel was ineffective for failing to move for suppression on this basis.

Defendant next claims that counsel was ineffective for stipulating to the qualifications of James McLellan, a Flint police officer, as an expert for the purpose of testifying about drug trafficking in Flint. Use of drug profiles as substantive evidence of guilt has been condemned by this Court. See *People v Hubbard*, 209 Mich App 234, 240-241; 530 NW2d 130 (1995). However, this Court has recognized that drug-related law enforcement is an acknowledged area of expertise. *People v Williams*, 198 Mich App 537, 542; 499 NW2d 504 (1993). McLellan had worked in drug enforcement for twelve years, had taken training from the Drug Enforcement Agency, had trained new officers in drug enforcement, and had testified at least a dozen other times in state and federal court as an expert. In addition, McLellan had participated in defendant's arrest and the investigation preceding it. His testimony as to the significance of the drugs found and his conclusions were not matters within the common knowledge of laymen. Cf. *People v Murray*, 234 Mich App 46, 59-60; 593 NW2d 690 (1999). The prosecution sufficiently established McLellan's qualifications as an expert. Further, while defense counsel stipulated to McLellan's status as an expert, he objected numerous times to the specific testimony offered as irrelevant to the case. We cannot conclude that defense counsel was ineffective on the basis that he stipulated to McLellan's qualifications.

Defendant claims that counsel was ineffective for failing to move before trial to quash the conspiracy count. We presume that defendant is arguing that the conspiracy count could have been quashed on the grounds of insufficient evidence at the preliminary examination to support the order binding defendant over for trial. However, we disagree with defendant's conclusion that such a motion would have been successful. The district court's decision to bind over is reviewed for an abuse of discretion. *People v Hamblin*, 224 Mich App 87, 91; 568 NW2d 339 (1997). In the present case, the evidence introduced at the preliminary examination was substantially the same as that introduced at trial. The evidence included defendant's confession, in which he admitted that he had agreed to help "Jay" pick up cocaine in Detroit and bring it to Flint. In order to use a defendant's confession, the corpus delecti of the offense first must be shown. *People v Cotton*, 191 Mich App 377, 386; 478 NW2d 681 (1991). In the case of conspiracy, the corpus delecti of the offense is an agreement to commit the crime; this agreement may be shown by circumstantial evidence. *Id.* at 393.

Defendant and two other individuals were stopped by police after the police had received an anonymous tip. After the police stopped them, defendant pulled his car back, then hit one of the officers with the car and escaped. During the chase prior to the stop, one of the occupants of the car discarded the drugs that were the subject of defendant's prosecution for possession with

intent to deliver. This evidence sufficiently showed the corpus delecti of conspiracy, and defendant's confession could be considered. *Cotton, supra*. Further, the only harm defendant claims to have suffered from the failure to quash the conspiracy count was the introduction of his confession. Even if the conspiracy charge would have been subject to quashal, the confession could still have been admitted to show defendant's liability for cocaine possession as an aider and abettor. Thus, the failure to move to quash the conspiracy count would have had no effect on the outcome of the trial. We cannot conclude that counsel was ineffective.

Next, defendant contends that he is entitled to reversal for prosecutorial misconduct stemming from four incidents, essentially falling into three groups. Review of unpreserved claims of prosecutorial misconduct is foreclosed unless no curative instruction could have removed any undue prejudice to defendant or if manifest necessity would result from this Court's failure to review the claimed misconduct. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Preserved claims of prosecutorial misconduct are reviewed to determine whether the defendant was denied a fair trial. *Bahoda, supra* at 266-267.

The incidents of which defendant complains are: (1) the prosecutor commented on defendant's failure to provide the home address and name of the person that had been sitting in the back seat of the car; (2) the prosecutor twice disparaged defense counsel as being paid "big money;" and (3) the prosecutor sought to elicit evidence about statements made by Cytrice Kemp, who was in the car with defendant and "Jay." We have discussed each of these complaints in disposing of defendant's ineffective assistance claim. As we noted previously, the prosecutor's comment on defendant's failure to act was a proper comment on admissible evidence of omissions from defendant's statements to police, the argument disparaging defense counsel, while improper, was harmless, and the prosecutor's line of examination about Kemp's statement, taken in context, was merely an attempt to ascertain that no evidence was uncovered in the police investigation to corroborate defendant's claim of duress. We cannot say that these actions denied defendant a fair trial, and no manifest injustice would result from declining to review defendant's unpreserved claims.

Defendant also argues that he was denied a fair trial when the court allowed hearsay evidence from an anonymous tipster, and when it improperly injected race into the proceedings. As with defendant's claim of prosecutorial misconduct, we have already addressed defendant's claims in the context of his claim of ineffective assistance of counsel. As we noted earlier, to the extent that any of the challenged actions were improper, no harm was shown.

We affirm.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Patrick M. Meter